give a title to a purchaser with the assistance of an Order of Court.

In view however of a decision of the Court of Appeal in Singapore (*Kasmerah* v. *Haji Mohd. Taib*, 8 S.S. Law Reports, page 113) I consider that the matter is really not open to me to decide and that I must follow that decision. In that case the Court held that it was not a liberty to look at that part of the document which contained the memorandum of charge and held *aliunde* that there was in fact a deposit of title deeds. Thornton J. in *Saminathan* v. *Ramasamy*, 8 S.S. Law Reports, page 117 and Law J. in *re M. D. Mistry*, 8 S.S. Law Reports, page 122 held the opposite, distinguishing *Kasmerah's* case. I agree with Stevens, J. that these cases are indistinguishable. I hold therefore that I am bound by the Court of Appeal's decision although if the matter were open to me I should decide in the same way but on different grounds.

Where an equitable mortgagee by deposit obtains an order for sale provision must be made for giving the purchaser a good title. A conveyance by the equitable mortgagee even under an Order of Court will only give the purchaser an equitable title, the legal estate being outstanding. A legal mortgagee exercising his power of sale under Ordinance 36 (Conveyancing and Law of Property) is in a different position. By virtue of Section 26(1) of the Ordinance he can convey the property sold for such estate and interest therein as is the subject of the mortgage and as the legal estate is transferred to the mortgagee by a legal mortgage he can convey the legal estate to the purchaser.

It was argued in England under a similar provision of the Conveyancing Act that an equitable mortgagee by deed in exercising his power of sale was able to convey the legal estate, *i.e.* a greater estate than was vested in him by virtue of his equitable mortgage, but it was held in the case of *Re Hodgson & Howe*, 35 Ch.D. page 668 (C.A.) that this was not so and that on such a conveyance the legal estate was left outstanding.

Where an order for sale with the approbation of the Judge is made under Section 1033(2) of the Civil Procedure Code the Court can direct that all proper parties join in the conveyance of the property sold in pursuance of the order. The defendants as mortgagors and entitled to the legal estate will be proper parties and the order should direct that the defendants join in the conveyance to the purchaser. On proof that the defendants are absent or neglect or refuse to execute the deed, application can be made to the Court under Section 570 of the Civil Procedure Code that the Registrar execute the Conveyance and his signature under Order of Court will have the same effect as execution by the defendants, *i.e.* it will operate to pass all the Defendants' estate. It is not correct that the Court should make an anticipatory order directing the Registrar to convey the Defendants' interest, as the jurisdiction under Section 570 does not arise until a party has been ordered to execute an instrument and has refused or neglected to do so (see Dart's Vendor and Purchaser, 8th Edition, page 1005 with reference to the practice under the analogous Rules and Orders in England.

Order accordingly.

Solicitors for the Plaintiff—

Donaldson & Burkinshaw.

[APPELLATE CRIMINAL JURISDICTION]

R. (S. ABDULRAHIMAN) - - Appellant

vs.

K. HAJI MEYDEEN - - - Respondent

[SINGAPORE MAGISTRATE'S APPEAL No. 52 OF 1932]

Frivolous complaint—complainant ordered to pay costs—Rigorous Imprisonment in default —Criminal Procedure Code, Sections 432 D, 433.

When an accused person is acquitted in the District Court and the Court considering the prosecution to be vexatious and without reasonable or probable cause orders the prosecutor to pay costs to the accused it may pass a sentence of rigorous imprisonment in default of payment of the Costs.

The appellant instituted a prosecution against the respondent charging him with forgery.

The District Judge (C. Wilson, Esq.) discharged the accused and made the following Order:—

> "I consider the prosecution vexatious and without reasonable cause. I give the accused his costs which I tax at $50 (which Mr. Phillips agrees is reasonable). In lieu of costs one month's rigorous imprisonment."

The appellant appealed against the order directing him to pay costs.

The case was argued on 19th December, 1932 and 14th January, 1933.

Tampoe-Phillips for Appellant. The prosecution cannot be said to be vexatious or without probable cause.

There cannot be a peremptory order for imprisonment in default of payment of costs. If imprisonment can be ordered it can only be simple and not rigorous.

McElwaine, D.P.P. for Crown. Notwithstanding *Tai Kun* v. *Public Prosecutor of Pahang*, 9 S.S.L.R. Appendix 62 and *Rex* v. *Tambiappan*, 13 S.S.L.R. 17 imprisonment can be imposed on a complainant who fails to pay costs ordered under Section 432D.

Section 433 means that any money ordered to be paid under the Criminal Procedure Code is to be regarded as fine. Sections 15, 273.

The word in S. 433 is "recoverable" not "leviable" which would be appropriate to distress.

Costs are "recoverable" by imprisonment under Section 18 of Summary Jurisdiction Act, 1848.

Imprisonment is therefore a method of recovery.

He referred to Sections 180(2) and 438(3) Criminal Procedure Code.

Cur. Ad. Vult.

21-1-1933.

MURISON, C.J.—This is an appeal against a decision of the District Judge. There are two points in the appeal.

The first point is against the finding that the prosecution was vexatious and without reasonable and probable cause. I see nothing in the case which disposes me to think that this finding was wrong.

The second point concerns the direction that the prosecutor pay $50 for costs to the accused, or in default undergo one month's rigorous imprisonment.

The order for costs cannot be said to be made under section 180 of the Criminal Procedure Code as compensation because first, the word 'compensation' is not used in the judgment, and secondly, not more than $25 can be awarded under the section.

The only other section applicable is Section 432D of the Criminal Procedure Code, which allows the Court to impose payment of costs on an accused person and to tax such costs.

By section 433 the amount of such costs can be "recovered" as if it were a fine. By Section 273(i)(b) a person upon whom a fine is inflicted can be ordered to undergo imprisonment in default of payment. The District Judge, therefore, apparently had power to give an alternative sentence of imprisonment.

Against this, however, it is argued that Section 433 only gives power to "recover" a fine; and that word unlike the word "enforce," only gives power to act on civil process. Imprisonment, therefore, it is said cannot be given in default of payment of the fine.

In my opinion this argument is not sound. The word "recover" used in relation to money payable, such as a fine, does not in the law refer exclusively to civil process. Thus in the Summary Jurisdiction Act, 1848 Section 18 it is provided that costs can be "recovered" by imprisonment. Again if only distress is particularly intended the appropriate word would be "levied" not "recovered." Further the proviso for imprisonment on default of payment of a fine in section 438(3) of our Code is omitted in the section 433; and from that it would appear that the law under section 273(i)(b) must be applied as it stands. That law allows recovery both by distress and by imprisonment. Section 438(3) is so specially worded that there can be no imprisonment unless distress, as a first remedy, has failed. To say that under sections 432 D, 433 and 273(i)(b) there can be no imprisonment on default, would be to put the provisions of those sections on a level with the provisions of section 438(3)—the latter subsection expressly reserving imprisonment until distress has failed, whereas there is no such reservation in section 273(i)(b).

Moreover, I am inclined to think that imprisonment in default of payment of a fine may in fact be regarded as a method of recovery of the fine, for under section 273(i)(e) of the Code the imprisoned person must be set free if he pays before his term expires.

Reference was made to the case of *Eusoff Hajee* v. *Municipal Commissioners of Singapore*, (1931) S.S.L.R. 81. Mr. Phillips for the appellant did not, however, rely upon it, and in my opinion that case is a decision on the provisions of Ordinance No. 135 (Municipal) and not on the Criminal Procedure Code. The provisions of the Code were mentioned only to be discarded as inapplicable. (See Judgment of Whitley, J. at pages 88 and 89).

I ought perhaps to add that the decision of this Court in *Rex* v. *Pallak Nath Singh* (Criminal Appeal No. 57 of 1932) deals with the same sort of question as this appeal, except that in that case it was the accused who was ordered to pay a sum of money whereas in the present case it was the prosecutor who was ordered to pay a sum of money. The result is that *Rex* v. *Pallak Nath Singh* is a decision upon sections 432(1) and (2) and 273 of the Criminal Procedure Code, whereas the present appeal is a decision on sections 432D, 433 and 273 of the Criminal Procedure Code.

The two decisions are complementary.

For the reasons I have given I would dismiss the appeal.

WHITLEY, J.—I have read the judgment of the learned Chief Justice with which I agree. There is only one observation which I would add. Sections 180 and 432 D of the Criminal Procedure Code both deal with cases in which the accused is acquitted and it appears to the Court that the prosecuton was either frivolous or vexatious or without reasonable or probable cause. The wording in the two sections varies but the substance is the same as regards the nature of the cases to which they are to apply. Both provide for an order for the payment of money in such cases by the complainant to the accused. In

section 180 it is by way of compensation and in 432 D it is for "full costs charges and expenses." In both cases the order for payment operates both as a punishment for the complainant and as a compensation or reimbursement for the accused.

The powers of a Court acting under section 180 are restricted, the maximum sum which can be awarded being $25.

Under section 432 D there is no limit to the sum which may be awarded but only the Supreme Court or the District Court has jurisdiction under this section. A Police Court has only the limited powers given by section 180. Section 180(2) provides that:—

> "The sum so awarded shall be recoverable as if it were a fine; provided that if it cannot be realised the imprisonment to be awarded shall be simple....."

Accordingly a Police Court clearly has power to order imprisonment in default.

Section 433 provides that:—

> "Any money other than a fine payable by virtue of any order under this Code shall be recoverable as if it was a fine."

That applies to money ordered by the Supreme Court or District Court to be paid under section 432D.

In my opinion it cannot have been intended that whereas the inferior Court has power to order imprisonment in default of payment the Supreme Court and the District Court should not in similar cases have a similar power.

I would dismiss the appeal.

TERRELL, J.—In this case the learned District Judge disbelieved the evidence for the prosecution and discharged the accused. He also found that the prosecution was "vexatious and without reasonable and probable cause" within the meaning of Section 432D of the Criminal Procedure Code and directed the prosecutor to pay the accused's costs which he taxed at $50. In lieu of payment he directed one month's Rigorous Imprisonment.

On the merits of the case I see no reason to differ from the learned District Judge's finding. Nor is there any dispute as to the amount of the costs awarded. The only question is whether the payment of such costs can be enforced by the alternative of one month's rigorous imprisonment.

This case is the converse of Criminal Appeal No. 57 of 1932. That was a case of payment to the prosecutor which fell under Section 432 of the Criminal Procedure Code and under Section 432(2) payment may be 'enforced' as a fine, whether the payment is in respect of costs (Section 432(1)(a)) or is compensation for injury to his person or character (Section 432 (1)(b)).

When the payment is to the accused person the order, if for costs, is made under Section 432 D, and is 'recoverable' as a fine under Section 433. If it is compensation on the ground that the prosecution was frivolous and vexatious it falls under Section 180 of the Criminal Procedure Code. Under that section the compensation is limited to $25, and under section 180(2) the sum so awarded is 'recoverable' as a fine, and if it cannot be realised (*i.e.* recovered by any method of execution) simple imprisonment not exceeding 30 days may be awarded. It is clear that the imprisonment, if any, is awarded by virtue of Section 273 of the Criminal Procedure Code but with the modification that the legislature has thought fit to mitigate the length and character of the imprisonment to be awarded. This was the construction placed by Hyndman-Jones, J.C. on Sections 172 and 239 of the F.M.S. Criminal Procedure Code of 1902, these sections corresponding to our Sections 180 and 273 (*see Tai Khun* v. *P. P. of Pahang*, 9 S.S.L.R. Appendix 62.

Section 180 deals with the case of compensation to an accused person when the trial has been concluded and the accused acquitted. Section 438 gives similar powers to a Police Court to award compensation where a person has been groundlessly given in charge. Here also the compensation is limited by Section 438(2) to $25. Section 438(3) reads as follows:—

> "All compensation awarded under this section may be recovered as if it was a fine and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Police Magistrate directs unless such sum is sooner paid."

The effect of this subsection is similar to Section 180(2) though in the latter case the imprisonment can be awarded if the fine "cannot be realised." Under Section 438(3) the words are 'if it cannot be so recovered."

In the present case, however, the Court has to deal, not with a case of compensation awarded under Section 180 or Section 438, but with costs awarded under Section 432 D.

The first point to notice is that the limited compensation provided for by Section 180 or Section 438 can be given by a Police Court, but only the Supreme Court or a District Court can give costs under Section 432 D. If therefore a Police Court can order simple imprisonment if the compensation is not paid, it would be reasonable to expect that the superior courts should be given similar, if not increased, powers. This consideration favours the construction that the absence of any words in Section 433 specifying the kind of imprisonment to be awarded, does not imply that the fine may not be enforced by imprisonment at all, but rather leads to the con-

clusion that Section 273 (provisions as to sentences and fines) applies without modification.

The chief difficulty lies in the use of the words "recoverable as a fine" in Section 433. In Sections 180(2) and 438(3) similar words are used and undoubtedly on the construction of these particular sections the recovery is to be by levying distress in the first instance under Sections 273(1)(b)(ii), and the words 'recoverable as a fine' may be contrasted with the words 'enforced as a fine' under Section 432(2). It is also true that Hyndman-Jones, J.C. in the case above quoted at page 63 was of the opinion that 'enforce,' cannot be considered as synonymous with 'recoverable' and considered that 'enforced,' the word used in the sections which he was construing, applied aptly to a possible realisation of the sum by stress of imprisonment. The learned judge, however, was not called upon to decide expressly whether the word 'recoverable' did not have the same effect and his expression of opinion on the subject must therefore be considered as *obiter*.

Then there is the case of *Eusoff Hajee Ahmad* v. *Municipal Commissioners of Singapore*, 1931 S.S.L.R. page 81, to be considered. In that case compensation awarded under the Municipal Ordinance was 'recoverable' under Section 362(2) of that Ordinance 'in the same way as if it was a fine imposed by a Police Court.' The Full Court decided in effect that the objects of the Municipal Ordinance had to be considered, that these objects clearly contemplated the payment of a sum of money and not the imprisonment of the person who was bound to pay it. The Court concluded that under provisions of the Municipal Ordinance no liability to imprisonment arose. This case is of importance as it shows that the objects of the particular ordinance, namely the payment of compensation, may be taken into consideration in arriving at a conclusion as to the meaning of the words 'recoverable as a fine.'

Applying that principle to the present case, it might be argued that the object of Section 432 D is merely to give to an accused person a simple remedy by way of costs so as to save him the necessity and expense of taking civil proceedings for malicious prosecution. If that were the only object I can see much force in the argument that the costs awarded are in the nature of a civil debt and should not be enforced by imprisonment in the first instance. The fallacy of this argument, however, lies in the fact that a vexatious and unreasonable prosecution may result in penal as well as civil consequences under Sections 182 and 500 of the Penal Code, and there is no reason to suppose that the legislature in giving powers to the Supreme Court and District Court under Section 432D did not contemplate the penal just as much as the civil consequences of a malicious prosecution. It certainly would have been more satisfactory if the legislature used in Section 433 the expression "enforced as a fine" instead of "recoverable as a fine." It is, however, impossible, to say that the words "recoverable as a fine" have any fixed or definite meaning, and the section must be construed so as to give effect to the probable intention.

Applying therefore, the principle of the case of *Eusoff Hadji Ahmad* v. *Municipal Commissioners of Singapore*, I come to the conclusion that the words "recoverable as a fine" in Section 433 import all the methods specified in Section 273 of the Criminal Procedure Code including rigorous imprisonment. I think, therefore, that the order appealed from is right and would dismiss the appeal.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION.]

REX - - - - - - Respondent

vs.

MOHAMED ALI - - - - Appellant

[MAGISTRATE'S APPEAL No. 39 OF 1931.]

Ordinance 96 (Minor Offences)—Section 33 (c);—Permitting prostitutes to resort—Act of Servant—Liability of employer—Capacity in which prostitutes resorted.

The licensee of a Café is guilty of an offence if his servants in the course of his employment knowingly permits prostitutes to meet or remain in the licenced premises but it must be proved that the prostitutes were on the premises in the capacity of prostitutes.

The appellant was on the 20th day of July, 1931, convicted before a Police Magistrate at Singapore for that he being the keeper of a house of public resort. to wit, Madras Café North Bridge Road, Singapore, did knowingly permit prostitutes to meet or remain therein between 29th April, 1931 and 7th June, 1931, an offence punishable under Section 33(c) of Ordinance 96 (Minor Offences) and was ordered to pay a fine of $50.

The appellant's Manager had in May 1931, been warned by the police that prostitutes frequented his premises.

In his grounds of decision the Magistrate said: